

Religion and Marriage Law: The Need for Reform

Stephanie Pywell

Senior Lecturer in Law, The Open University Law School

RUSSELL SANDBERG

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Almost all academic commentators agree that marriage law in England and Wales is in urgent need of reform. It differentiates between civil and religious weddings, gives primacy to the unique position of the Anglican Church, and treats Quakers and Jews as special cases while clumping all other religions together. It affords a high degree of discretion about the content of wedding ceremonies to registrars who, as the state's representatives, are charged with solemnising civil marriages. This means that it does not reflect the needs of a multi-faith society in which couples of diverse beliefs – and none – have no choice but to shoehorn their desired wedding into one of a limited range of unsuitable forms, or to separate their legally binding marriage ceremony from a religious, secular or blended celebration that is meaningful to them.

This book provides a comprehensive and comprehensible overview of a topical socio-legal problem. Russell Sandberg tackles his subject head-on, starting with an introductory chapter titled *Marital Problems*, and dividing the eight substantive chapters into three parts: *The Legal Framework*, *The Road to Reform* and *Reform Proposals*, before Chapter Ten, *Conclusion: Relationship Solutions*. The book's opening sentence states that the law is 'in desperate need of reform',¹ signalling at the outset that it sets out Sandberg's strongly held point of view, rather than providing a disinterested and balanced consideration of multiple opinions. The book nonetheless gives a thorough overview of its subject in a way that would be useful reading for all parliamentarians who, it is to be hoped, will shortly be voting on proposals to replace what the Law Commission terms 'an ancient and complex hodgepodge of different rules for different types of ceremonies'² with a clear, fair and consistent law governing weddings.

Chapter One is a six-page summary of the current law on marriage ceremonies in England and Wales, including brief historical aspects. It highlights the law's unfitness for purpose in a multi-cultural society in which many couples choose to cohabit without undergoing any form of commitment ceremony, and others choose to participate in wedding-style ceremonies that have no legal effect. It states that the book's purpose is to 'galvanise the need for reform',³ and identifies its objectives of explaining and demystifying the law, documenting and critically analysing the debate so far, and suggesting solutions that draw upon and develop the Law Commission's work on weddings (at the time of publication, the Commission's most recent publication was its Consultation Paper).⁴

¹ At p 1.

² Law Commission, *Getting Married: A Consultation Paper on Weddings Law*. Consultation Paper 247, 03 September 2020, para 1.33, quoted at p 69. Available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/09/Getting-Married-A-Consultation-Paper-on-Wedding-Law-web.pdf> (Accessed 1 November 2021).

³ At p 5.

⁴ Above N 2. [Law Commission, *Getting Married: A Consultation Paper on Weddings Law*. Consultation Paper 247, 03 September 2020. Available at [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/09/Getting-Married-A-Consultation-Paper-on-Wedding-Law-web.pdf)

The unique position of the Church of England and Church in Wales within current mixed-sex marriage law is explained from an historical perspective in Chapter Two, which contrasts it with the secular starting-point for divorce law. The closing paragraph of the chapter refers to ‘an antiquated and overly complex legal framework that indirectly discriminates against some religious traditions and excludes non-religious beliefs’.⁵ While those with no religious or other beliefs, and couples who do not share a belief system, are not specifically identified here, the book does later discuss the fact that they are discriminated against.

Chapter Three deals with the labyrinthine changes that have occurred since 2004 in the legal regulation of same-sex partnerships. Developments between the passing of the Civil Partnership Act 2004 and that of the Marriage (Same Sex Couples) Act 2013 were convoluted because ‘changes have been bolted onto the existing legal framework in a way that means that the law on adult intimate relationships is increasingly complex and continues to focus solely on particular relationship forms’.⁶ Sandberg notes, rightly, that the development is welcome, but laments the fact that it has been achieved via a ‘bewilderingly complex legal framework’.⁷

These opening arguments are clearly set out, and Sandberg generally argues his case well. The clarity of the book would, however, have been improved by consistent terminology for what Sandberg introduces as ‘wedding ceremonies [that] currently take place outside the legal framework’.⁸ The remainder of the book refers to such ceremonies and the resulting unions as ‘unregistered religious marriages’, ‘non-registered marriages’, ‘religious only marriages’, ‘humanist weddings’, ‘non-religious wedding ceremonies’, ‘non-religious ceremonies’, ‘non-religious marriages’, and ‘religious marriages’. The last five terms could apply equally to weddings that are recognised by the law of England and Wales, thereby conveying the opposite of what Sandberg means.

The question of how to refer to such ceremonies and unions is expressly considered in Chapter Four, *Unregistered Religious Marriages*, which describes the recent history of publicly expressed concerns about the fact that some religious wedding ceremonies – most notably many Islamic *nikahs* – do not necessarily have any legal effect in England and Wales. In *Akhter v Khan*,⁹ Williams J had distinguished between a void marriage and a non-marriage, but the Court of Appeal preferred the term ‘non-qualifying ceremony’.¹⁰ Sandberg is justifiably critical of successive failed attempts to criminalise those who conduct such ceremonies, pointing out that introducing new offences could not solve the real issue: these reforms would neither provide potential remedies for those already in such relationships, nor prevent further non-qualifying ceremonies from taking place.

Chapter Five, *Non-religious marriages*, begins with an overview of what the law deems to be ‘a religion’, and criticises *R (on the application of Hodkin) v Register General of Births, Deaths and Marriages*¹¹ on the basis that the Supreme Court had erroneously assumed ‘that a civil wedding is an appropriate substitute for humanists’.¹² Sandberg supports the view that humanists require weddings that are different from civil ceremonies conducted by registrars because the couple and celebrant would share humanist beliefs. The chapter then reviews a decade of failed attempts to

[11jxou24uy7q/uploads/2020/09/Getting-Married-A-Consultation-Paper-on-Wedding-Law-web.pdf](https://www.gov.uk/government/uploads/2020/09/Getting-Married-A-Consultation-Paper-on-Wedding-Law-web.pdf) (Accessed 1 November 2021).]

⁵ At p 18.

⁶ At p 27.

⁷ Ibid. [At p 27.]

⁸ At p 3.

⁹ [2011] EWFC 54.

¹⁰ *Her Majesty's Attorney General v Akhter* [2020] EWCA Civ 122.

¹¹ [2013] UKSC 77.

¹² At p 51.

amend legislation to permit humanists to solemnise marriages, before discussing *R (On the Application of Harrison) v Secretary of State for Justice*.¹³ Sandberg makes the valid point that Eady J could have reflected her stated belief of an injustice inherent in the Marriage Act 1949 by making a declaration of its incompatibility with Article 9 of the European Convention on Human Rights (freedom of religion or belief). The chapter concludes by widening the discussion to include my research into independent celebrants who offer non-legally-binding bespoke ceremonies that can include secular and religious content, or blend elements from different religions. Sandberg concludes that, if the law were changed to permit independent celebrants to solemnise marriages, 'it makes little sense to limit the organisations that can solemnise weddings to religion or belief organisations',¹⁴ and aptly observes that to permit humanists, but not other organisations or independent celebrants, to conduct legally binding marriages 'would simply be to move the line where discrimination occurs'.¹⁵

This leads neatly to Chapter Six's discussion of the Law Commission's proposals.¹⁶ The complexity of, and detail in, the 458-page Consultation Paper explains why this chapter – most of which constitutes a critique of some of the Commission's proposals – is the longest in the book. One of Sandberg's main contentions is that the unique position of the Anglican Church in England and Wales, coupled with the Commission's proposal to permit limited categories of religious and non-religious belief organisations to nominate officiants who could solemnise marriages, mean that the system proposed in the Consultation Paper is 'not really officiant focused at all'.¹⁷ The discussion of whether the Commission's proposals 'would mitigate the issue of unregistered religious marriages'¹⁸ attempts to simplify the potential criteria for valid, void, voidable and non-qualifying marriages into a four-column, eight-row table that I found less easy to understand than the Consultation Paper's flowchart dealing with the same criteria.¹⁹ Despite his misgivings about some aspects of the Commission's proposals, Sandberg comments that 'the Law Commission's radical and comprehensive proposals would provide a solution to the concerns expressed about the current non-recognition of non-religious marriage',²⁰ and opines that 'the general direction of travel proposed and the changes to preliminaries, ceremony and location are sound and much needed'.²¹ He believes, however, that the proposals are insufficient to solve the problem, and that more is needed to 'provide an equal, fair and modernised law recognising and regulating intimate adult relationships'.²²

Acknowledging that the Law Commission was limited by its terms of reference, and noting that its proposals could, potentially, be 'cherry-picked' by government in such a way that they did not fulfil the Commission's objectives²³, Chapter Seven sets out Sandberg's own, more radical, proposals.

¹³ [2020] EWHC 2096 (Admin).

¹⁴ At p 64.

¹⁵ At p 63.

¹⁶ Above N 2. [Law Commission, *Getting Married: A Consultation Paper on Weddings Law*. Consultation Paper 247, 03 September 2020, para 1.33, quoted at p 69. Available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7g/uploads/2020/09/Getting-Married-A-Consultation-Paper-on-Wedding-Law-web.pdf> (Accessed 1 November 2021).]

¹⁷ At p 82.

¹⁸ At p 72.

¹⁹ Law Commission, *Getting Married: A Consultation Paper on Weddings Law*. Consultation Paper 247, 03 September 2020, Appendix 6, p 436. Available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7g/uploads/2020/09/Getting-Married-A-Consultation-Paper-on-Wedding-Law-web.pdf> (Accessed 1 November 2021).

²⁰ At p 90.

²¹ IBID [At p 90].

²² At p 91.

²³ At p 96.

These, too, need to be taken as a complete package that, via a new statute, would ‘consolidate and modernise the law on marriage and civil partnerships for both opposite- and same-sex couples, as well as introducing certain rights for cohabitating couples’ (*sic*).²⁴ This proposed panacea would involve six major changes: (i) the presence of an officiant at all weddings to ensure that the legal requirements were met; (ii) the appointment of every officiant following either nomination by an organisation or an individual application; (iii) universal civil preliminaries; (iv) a codified and simplified law on validity of marriage; (v) the amendment of criminal offences associated with forced marriage, coercive control and fraud; and (vi) the creation of ‘limited and specific’ rights,²⁵ with opt-out provisions, for cohabitants who suffer disadvantages when their relationships end.

While it is impossible to argue with the assertion that the Marriage Act 1949 is ‘no longer fit for purpose’ and is ‘a throwback to a bygone age’,²⁶ Sandberg provides no source for his contention that ‘many people who go through a religious, belief or independent celebrant ceremony think that they are married, or at least use that language’.²⁷ The ‘language’ aspect might be true, but is unimportant. The more significant assertion might be true of couples who opt for religious-only or humanist ceremonies, but independent celebrants who are members of the organisations belonging to the Wedding Celebrancy Commission (WCC) are bound by its professional standards, which state that celebrants must ‘[i]nform all couples clearly that the ceremony conducted does not create a legally binding marriage’.²⁸

The centrepiece of the chapter is Sandberg’s draft legislation, in which he draws on laws from Scotland, Ireland, Northern Ireland, Jersey and Guernsey to propose a system under which all organisations could nominate officiants, and which would allow individual applications only from ‘genuinely independent celebrants’.²⁹ He expressly includes ‘umbrella organisations of independent celebrants’³⁰ – although there is only one ‘umbrella organisation’: the WCC – as organisations that would be able to nominate officiants. Section 2(4)(a), however, would require an organisation to have at least 50 members³¹; since the WCC consists of 13 people – two representatives from each of six organisations, and one member who represents celebrants who are not associated with any organisation – it would not qualify as a nominating organisation. Presumably, therefore, the non-umbrella organisations represented on the WCC would have to nominate their own officiants. A further difficulty is presented by Section 2(4)(b), which would provide that a nominating organisation must not have the solemnisation of marriage as its ‘principal or sole purpose’.³² At present, the WCC ‘seeks to be the central organisation providing representation and support to wedding and family celebrants in the UK and to supply information to couples, families and external organisations seeking a greater understanding of celebrancy’.³³ It is unclear whether, or how, these avowedly celebrant-focused objectives might change if the law were significantly amended, but it does seem likely that the principal purpose of the WCC would be related to the solemnisation of marriage, which would be a further bar to its inclusion in Sandberg’s criteria. If, however, the WCC

²⁴ *Ibid.* [At p 96.]

²⁵ At p 98.

²⁶ *Ibid.* [At p 98.]

²⁷ *Ibid.* [At p 98.]

²⁸ Wedding Celebrancy Commission, 2019. *Professional Standards – Couples Ceremonies*, at p 4. Available at <https://weddingcelebrancycommission.org/assets/CELEBRANTS%20NATIONAL%20STANDARDS%20Couples.pdf>, (Accessed 1 November 2021).

²⁹ At p 110.

³⁰ At p 109.

³¹ At p 112.

³² *Ibid.* [at p 112.]

³³ Wedding Celebrancy Commission, 2020. Available at <https://www.weddingcelebrancycommission.uk/index.html> (Accessed 1 November 2021).

widened its aims to the promotion of wedding-related goods or services, its members would, by definition, be acting in what would, under the Law Commission's proposals, be a prohibited 'conflict of interest with their role as an officiant, by commercialisation of that role as a means of making money from additional services'.³⁴ Sandberg raises some good arguments against limiting nominating organisations to those professing a religion or belief, but his proposals require significant refinement if they are to bring 'the majority of independent celebrants'³⁵ into the fold of nominated officiants rather than individual applicants, particularly since an unknown number of celebrants are not affiliated to any organisation at all.

Chapter Eight presents more draft legislation, this time giving effect to Sandberg's simplified proposals for the criteria that determine whether a marriage is valid, void, voidable or non-qualifying. One essential requirement for validity is that both parties 'express consent at the wedding',³⁶ though their means of doing so are not defined; it is unclear whether Sandberg agrees with the Law Commission that the signing of the schedule would suffice to constitute consent, even if no other expression of consent had occurred during the ceremony. The difference between this proposal and the Law Commission's similar suggestion would have been clearer if both had been presented similarly, but the different formats present an enjoyable challenge for readers who enjoy logic-based puzzles. The final section of the chapter argues that amending existing criminal offences would be preferable to creating the new ones identified by the Law Commission.

The focus of Chapter Nine is cohabiting couples who are not legally married. It reviews laws relating to the rights of such couples in Scotland and Ireland, as well as the Law Commission's 2007 proposals, and Private Member's Bills proposed by Lords Lester and Marks in 2009 and 2013 respectively. The common threads in all these schemes, Sandberg argues, should feature in his putative Intimate Adult Relationships Act, creating an opt-out scheme that would enable a fairer distribution of assets to unmarried couples when their relationships end. There is little to criticise in the substance of such a proposal, given the large numbers of unmarried cohabiting couples in England and Wales in the 21st century, and it is baffling that no UK government has chosen to mitigate the often catastrophic consequences when such relationships end. That said, the terms of reference for *Getting Married* were very limited, so it seems unlikely that the UK Government would be prepared to grasp the more extensive nettle of reforming the law governing weddings and introducing new provisions to protect the rights of those who are not married. It is regrettable that Sandberg's most significant proposal, despite its attractiveness, appears to be unlikely to be brought into law in the foreseeable future.

Chapter Ten provides a three-page summary of the book's main criticisms of the current law, and gives an overview of how Sandberg considers these should be addressed. It is a clear and concise ending to a book that offers an accessible insight into the problems posed by the effects of a law still based on principles established just before Queen Victoria's ascension to the throne.

³⁴ Above N2 at 3.53. [Law Commission, *Getting Married: A Consultation Paper on Weddings Law*. Consultation Paper 247, 03 September 2020. Available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/09/Getting-Married-A-Consultation-Paper-on-Wedding-Law-web.pdf> (Accessed 1 November 2021).]

³⁵ At p 117.

³⁶ At p 122.